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October Term, 1979
No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,
*Petitioners*

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
*Respondents*

## BRIEF FOR AMICUS CURIAE ON WRIT OF CERTIORARI FROM THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

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## INTEREST OF AMICI

The Commonwealths of Pennsylvania and Massachusetts and the States of New Hampshire, New Jersey, Rhode Island, Vermont and Delaware sponsored by their Attorneys General file this brief *amici curiae* in this matter in support of petitioners, the State of Maine and Michael R. Petit.

The question presented in this case is whether Section 1 of the Civil Rights Act of 1871 (often referred to as the Ku Klux Klan Act of 1871), now codified in 42 U.S.C. §1983, provides a cause of action for a violation of the Social Security Act and, by extention, of any federal statute. This question has wide-ranging impact on the *amici* as well as all other State and local governmental units. A sweeping view of Section 1983 which provides a cause of action for violations of all federal statutes would subject State and local governments to suit under Section 1983 whenever *any* federal statute is alleged to have been violated by State or local officials.

Further, the application of the attorney's fees provision of 42 U.S.C. §1988 to suits under Section 1983 creates additional, and not insignificant, financial burdens on *amici* and all State and local governments in matters where it simply was not intended to apply.[1]

[1] In December, 1977, the National Association of Attorneys General adopted a resolution entitled "Opposition of Awards of Attorney's Fees against States", in which the fiscal impact of such awards on state treasuries was raised.

## ARGUMENT

### I.

### Section 1983 Provides a Cause of Action Only for Violations of Constitutionally-Protected Rights and Not for Violations of All Federal Statutes

Ever since this Court's decision in *King v. Smith,*[2] 392 U.S. 309 (1968), this Court, as well as the vast majority of lower courts, have "uncritically" assumed that 42 U.S.C. §1983 (1974)[3] provides a cause of action for a broad range of federal statutory, as well as constitutional, claims. *See, e.g., Miller v. Youakim,* 440 U.S. 125 (1979) (Aid to Families with Dependent Children-Foster Care Program); *Edelman v. Jordan,* 415 U.S. 651 (1974) (Aid to Aged, Blind and Disabled); *Hagans v. Lavine,* 415 U.S. 528 (1974) (Aid to Families with Dependent Children ("A.F.D.C."); *Dandridge v. Williams,* 397 U.S. 471 (1970) (A.F.D.C.); *Louise B. v. Colautti,* 606 F.2d 392 (3d Cir. 1979) (A.F.D.C.); *Tongal v. Usery,* 601 F.2d

[2] *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 644 (1979) (Powell, J., concurring).

[3] 42 U.S.C. §1983 (1974) reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."



1091 (9th Cir. 1979) (Emergency Unemployment Compensation Act of 1974); *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974) (Title XIX of the Social Security Act (Medical Assistance)); *Gomez v. Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969) (Wagner-Peyser Act of 1933).

This case presents the question of whether Section 1983 provides a cause of action specifically for claims under the Social Security Act and generally for claims under all federal statutes. The question now before this Court was the subject of concurring opinions by Justices White and Powell last term in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979). It is now time to look at this important, yet long-unanswered, question.[4] It is *amici's* position that Section 1983 provides a cause of action only for violations of constitutional or civil rights[5] and not for violations of every federal statute. For this Court to view Section 1983 as furnishing a cause of action for violations of every federal statute would be to

[4] This Court has indicated on a number of occasions its recognition that it has never definitively answered the question now before it—whether Section 1983 creates a private cause of action for claims under the Social Security Act and all Federal statutes. *See Southeastern Community College v. Davis,* 99 S.Ct. 2361, 2366 n. 5 (1979); *Cannon v. University of Chicago,* 441 U.S. 677, 700 n. 27 (1979); *Hagans v. Lavine,* 415 U.S. 528, 533 n. 5 (1974). *See also Burks v. Lasker,* 441 U.S. 471, 476 n. 5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided.")

[5] The history of Sections 1983 and 1343 make clear that Congress viewed "constitutional" rights and "civil" rights as conceptually identical, i.e., providing for the fundamental rights of the citizens of the nation. *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 632-33 and n. 14, 640 n. 24. (Powell, J., concurring).

create federal causes of action where none previously existed.

This Court has extensively discussed and analyzed the legislative history of Section 1983 on numerous occasions in recent years. *See, e.g., Chapman v. Houston Welfare Rights Organization, id.; Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978); *Examining Board of Engineers, Architects and Surveyors v. Flores De Otero,* 426 U.S. 572 (1976); *Lynch v. Household Finance Corporation,* 405 U.S. 538 (1972); *Monroe v. Pape,* 365 U.S. 167 (1961). The one theme that runs throughout these and other cases is that Section 1983 was enacted to safeguard the constitutional rights guaranteed to the citizens of the United States by the Fourteenth Amendment. *See District of Columbia v. Carter,* 409 U.S. 418, 423 (1973).

The present Section 1983 has its origin in Section 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13.[6] *See Examining Board of Engineers, Artchitects and Surveyors v. Florees De Otero,* 426 U.S. at 581. It was one means by which Congress exercised its newly-vested power of Section 5 of the Fourteenth Amendment. *Monroe v. Pape,* 365 U.S. at 171.

The purpose of Section 1 of the Ku Klux Klan Act, now Section 1983, is clear from the title of the legislation: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." *Monroe v. Pape, id.* at 171. The "other purposes" were intended primarily to deal with sup-

[6] The Ku Klux Klan Act of 1871, in turn, traces its origin to Section 2 of the Civil Rights Act of 1866, 14 Stat. 27. *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 627-28.



pressing Ku Klux Klan violence in the South. *Monell v. Department of Social Services of the City of New York,* 436 U.S. at 665.

What Congress had in mind when it passed Section 1983 was to provide first, a remedy against invidious, discriminatory legislation, second, a remedy where State law was inadequate, and finally, a remedy against the failure of State or local officials to enforce the law with an equal hand—*i.e.,* violations of the Fourteenth Amendment. *See Monroe v. Pape, id,* at 173-75.[7]

Section 1 of the Ku Klux Klan Act of 1871, then, provided only for a cause of action for a deprivation under color of state law of "any rights, privileges or immunities secured by the Constitution of the United States". This is clear from the language of the statute and even more so from the Congressional intent behind the Act.

The phrase "and laws", around which this controversy revolves, was not added until 1874 as part of the statutory codification process then underway. This phrase

[7] Mr. Blanchard from Illinois, described the situation giving rise to the Civil Rights Act of 1871:

> "If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to ban together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

was apparently added without any congressional activity or explanations. *See Examining Board of Engineers, Architects and Surveyors v. Flores De Otero,* 426 U.S. at 583 n. 12; Note, Federal Jurisdiction over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404, 1418 (1972). Justice Powell's concurring opinion in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 623-46, demonstrates that the purpose and legislative history of Section 1983 as well as the rules of proper statutory construction all impel the conclusion that the "and laws" phrase cannot be viewed as quietly and explosively creating a private cause of action for all federal statutes. There simply is no support in the Congressional history of the Civil Rights Acts of 1866, 1870 and 1871 for such a view. Moreover, an amendment of the magnitude involved in creating a private cause of action for all federal statutes could not have been accomplished as unceremoniously as the "and laws" was added to Section 1983.

Today we are accustomed to federal court involvement in many aspects of our day-to-day lives; however, in 1874 the concept of wide-ranging federal court jurisdiction was still a nascent concept. *See generally Mitchum v. Foster,* 407 U.S. 225, 239-42 (1972). For Congress to have intended the "and laws" phrase to create a private cause of action in the federal courts for all federal statutes would most certainly have caused more discussion and debate than that engendered by the 1874 statutory revision. The only reasonable interpretation of the "and laws" phrase is that it was intended to go no further than the original purpose of Section 1 of the Ku Klux Klan Act—*i.e.,* to refer to violations of the basic rights guaranteed by

Cong. Globe, 42 Cong., 1st Sess. 653, *quoted in Monroe v. Pape,* 365 U.S. at 176-77.



the Fourteenth Amendment.[8] There is absolutely no indication in the legislative history of Section 1983 that Congress envisioned creating a private right of action for every federal statute regardless of any connection with a violation of a constitutionally-protected right. Such an increase in the jurisdiction of the federal courts cannot be lightly inferred.

Justice White's concurring opinion in *Chapman v. Houston Welfare Rights Organization,* 440 U.S. at 646-72 (1979), as well as that of the dissenting justices rely heavily on the "view repeatedly stated in previous cases that §1983 encompasses federal statutory as well as constitutional" claims, *id.* at 658. However, a close analysis of those cases reveals that the question now before this Court has not yet been definitively answered.

In *King v. Smith,* 392 U.S. 309 (1968), the claim under Section 1983 averred both constitutional as well as statutory violations. Likewise in *Rosado v. Wyman,* 397 U.S. 397 (1970), the statutory claim was presented as pendent to an equal protection claim. In *Dandridge v. Williams,* 397 U.S. 471 (1970), plaintiffs brought suit to enjoin a Maryland welfare regulation on the basis that it conflicted with the Social Security Act and the Fourteenth Amendment. 397 U.S. at 473. In *Edelman v. Jordan,* 415 U.S. 651 (1974), plaintiffs' complaint alleged claims under the Fourteenth Amendment and the Social Security Act. This Court noted that the district court exercised ju-

[8] This Court has recognized, in other contexts, that Section 1983 applies only to the fundamental rights protected by the Fourteenth Amendment. *See Martinez v. California,* 48 U.S.L.W. 4076, 4078 (Jan. 15, 1980) (". . . it is perfectly clear that not every injury in which a state official has played some part is actionable under [Section 1983]"); *Paul v. Davis,* 426 U.S. 693 (1976).

risdiction over the statutory claim pendent to the constitutional claim. 415 U.S. at 653 n. 1.[9] Most recently in *Miller v. Youakim,* 440 U.S. 125 (1979), the plaintiffs' complaint averred that the challenged Illinois foster care payment scheme violated the Equal Protection Clause as well as the Social Security Act. *Id.,* 425 U.S. 231, 232-33 (1976).

Indeed, many of this Court's opinions contain language suggesting that Section 1983 applies only to constitutional claims. In *Moore v. County of Alameda,* 411 U.S. 693 (1973), this Court stated that Section 1983 "was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges and immunities". 411 U.S. at 699. *See also Quern v. Jordan,* 440 U.S. 332, 354 (1979) (Brennan, J., concurring) (Section 1983 enacted to enforce the Fourteenth Amendment; *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 690-91 (1978).

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[9] The Court in *Edelman* cited with approval its substantiality doctrine enunciated in *Hagans v. Lavine,* 415 U.S. 528 (1974). Although *Hagans* is often cited in support of the view that Section 1983 applies to all statutory claims, it would actually appear to support petitioner's position.

The Court in *Hagans* approved of the practice of asserting jurisdiction over a not wholly insubstantial constitutional claim and then deciding the merits of the case on the pendent statutory claim. This rule certainly leads one to wonder why there need be the use of pendent jurisdiction under the constitutional claim, if the statutory claim stated a cause of action and was within the court's jurisdiction in its own right. If anything, *Hagans* would seem to stand for the proposition that Section 1983 claims for violations of the Social Security Act do not state a cause of action and federal courts lack jurisdiction over any such claims.



Furthermore, the legislative history of Section 1983 and its jurisdictional counterparts demonstrates that Congress intended to provide federal jurisdiction for causes of action authorized under Section 1983. But after this Court's decision in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 623, there is no federal jurisdiction for non-constitutional federal claims, such as violations of the Social Security Act. Consequently, a decision that Congress intended the phrase "and laws" to refer to all federal statutes would result in the anomalous situation where a federal court lacks jurisdiction over a cause of action under the Civil Rights Act of 1871. Eight members of this Court have either explicitly or implicitly rejected this possibility. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. at 616-20 (Stevens, J.); 645-46 (Powell, J., concurring); 674 (Stewart, J., dissenting). As Justice Stewart correctly pointed out " 'the common origin of §§1983 and 1343(3) in §1 of the Civil Rights Act of 1871 suggests that the two provisions were meant to be, and are, complementary.' [quoting] Examining Board v. Flores de Otero, 426 U.S. 572, 583." *Id.* at 674.

In order to maintain the Congressionally-intended parity between Section 1983 and its jurisdictional counterpart, the "and laws" phrase can only refer to statutes enacted to protect rights protected by the Fourteenth Amendment.

Moreover, there is no need to apply Section 1983 to all federal statutes to provide a private right of action for violations "under color of law". Congress and this Court have the ability and tools to determine which federal statutory rights are to be subject to a private right of action without resort to the overextension or bootstrapping of Section 1983.

This Court has often examined statutes to ascertain whether a private right of action has been provided to sue for a violation of that statute. In *Cort v. Ash*, 422 U.S. 66 (1975), this Court reviewed this area of the law and gleaned four basic factors to be utilized in determining whether a private right of action is implicit in a statute not expressly providing one.[10]

Since its decision in *Cort v. Ash*, this Court has applied these factors in a number of cases.[11] The *Cort* implied-right-of-action analysis is a workable and practical tool to determine whether Congress intended to provide a private right of action in a particular statute. There is no reason why this analysis cannot and should not be applied to the Social Security Act and other federal statutes instead of expanding Section 1983 beyond its intended purpose.

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[10] The four factors are:

(1) Whether the plaintiff is one of the class for whose special benefit the statute was enacted;

(2) Whether there is any legislative intent to create or deny such a remedy;

(3) Whether it is consistent with the underlying legislative scheme to imply such a remedy; and

(4) Whether the cause of action is one traditionally relegated to State law and therefore inappropriate to infer a federal cause of action?

422 U.S. at 78. *See Cannon v. University of Chicago*, 441 U.S. 677, 689-709 (1979).

[11] During this term and last term, this Court applied the implied right of action rule in a number of cases. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S.Ct. 242 (1979); *Touche Ross & Co. v. Redington*, 99 S.Ct. 2479 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). *See also Southeastern Community College v. Davis*, 99 S.Ct. 2361 (1979); *Davis v. Passman*, 99 S.Ct. 2264 (1979); *Burks v. Lasker*, 441 U.S. 471 (1979).



Congress, too, can readily indicate whether it intends to create a private cause of action when it enacts a particular statute. Certainly Congress has done so in the past. *See, e.g.*, Age Discrimination in Employment Act of 1967, Pub. L. 93-259, *as amended*, 29 U.S.C. §626 (Supp. 1979); Civil Rights Act of 1964, Title II & VII, Pub. L. 88-352, *as amended*, 42 U.S.C. §§2000a-3, 2000e-5 (1974); Communications Act of 1934, 48 Stat. 1964, *as amended*, 47 U.S.C. §207 (1962); Crime Control Act of 1979, Pub. L. 91-452, 18 U.S.C. §1964 (Supp. 1979); Securities and Exchange Act of 1934, 48 Stat. 881, *as amended*, 15 U.S.C. §78r (1971); Vietnam Era Veteran Readjustment Assistance Act of 1974, Pub. L. 93-508, *as amended*, 38 U.S.C. §2022 (1979).

If Section 1983 applies to a violation of all federal statutes, then the framework of many pieces of legislation which Congress has carefully designed to meet the complexities peculiar to individual acts may be disrupted. *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1290-92 (1953). For example, under the overextended view of Section 1983, violations of the National Labor Relations Act, 49 Stat. 449, *as amended*, 29 U.S.C. §§151, 160 (1973), may be subject to a private cause of action under Section 1983. Similarly, the procedures designed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, could be bypassed by a suit under Section 1983. Again, in light of these and other Congressional actions subsequent to the enactment of Section 1983 it seems very unlikely that the "and laws" phrase was intended to apply to violations of all federal statutes regardless of whether the statute dealt with a constitutionally-protected right.

There may be also instances where Congress does not desire a private cause under a particular statute but wishes to rely on the enforcement mechanism provided by the statutory framework. To permit Section 1983 to create a private cause of action for violations of those statutes would act to frustrate the congressionally-designed framework. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974).

Finally, the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, Publ. L. 94-559, 42 U.S.C. §1988 (Supp. 1979), the most recent congressional activity relating to Section 1983, makes clear that Congress views that section as an act providing a remedy for deprivations of constitutionally-protected rights. *See* Sen. Rep. No. 94-1011, 94 Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908. The driving force behind this Act was to make it economically feasible for citizens to vindicate their "civil rights" against those who violate "the Nation's fundamental laws". *Id.* at 5910. The emphasis was on providing a vehicle to facilitate and encourage vindication of the essential rights of citizens of this country—*i.e.,* constitutionally-protected rights. Nowhere is there a hint that Congress viewed Section 1983 as providing a private right of action for violations of all federal statutes regardless of any connection with constitutional rights.

For these reasons, respondents' claim of violations of the Social Security Act does not state a cause of action cognizable under Section 1983 and the Supreme Judicial Court of Maine erred in ruling that respondents had such a cause of action.



## II.

## The Attorney's Fees Provision of Section 1988 Was Not Intended To Apply to Actions in State Courts

This case raises the additional question of whether Congress intended 42 U.S.C. §1988 to be applied in State court actions. The legislative history of Section 1988 indicates that it does not.

The purpose of the 1976 amendment to Section 1988 was "to remedy anomolous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). . . ." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 5909. In *Alyeska,* this Court simply placed in historical perspective the inability of federal courts to tax costs, such as attorneys fees, in the absence of specific congressional authority.[12] Congress only intended to address the technical requirement laid down in *Alyeska,* and did not intend to create a "startling new remedy". S. Rep. No. 94-1011 at 6, *id.* at 5913. In fact, the Act itself amended 42 U.S.C. §1988, a statute which otherwise deals exclusively with the procedures which federal courts are to use in civil rights cases.[13]

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[12] "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that *federal courts* cannot award attorneys' fees . . . , those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing parting in *federal litigation. . . .*" *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. at 269 (emphasis added).

[13] *See Robertson v. Wegmann,* 435 U.S. 584 (1978); *Moore v. County of Alameda,* 411 U.S. 693, 702 (1973); *Veres v. County of*

Since the Congress intended only to deal with gaps left by *Alyeska* (S. Rep. No. 94-1011 1; H. Rep. No. 94-1558, 94th Cong., 2d Sess. 2 (1976)) and since *Alyeska* was decided by this Court in its supervisory powers over *federal* courts, it stands to reason that Section 1988 was never intended to authorize a State court to award attorney's fees to prevailing parties absent independent authorization by the State legislature. The remarks of nearly every member of Congress addressing the debate over the Section 1988 amendments were clear in their intent that they were addressing only an issue of costs as they relate to federal courts.[14] This interpretation of Section 1988 is consistent with the position taken by this Court as to other federal claims when filed and tried in State courts. In a long line of cases, this Court has ruled that State courts are free to determine their own methods of procedure and practice in the trial of suits arising under federal law, so long as the procedure does not directly effect the claim.[15] *See Brown v. Western Railway,* 338 U.S.

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*Monroe,* 364 F. Supp. 1327, 1329 (E.D. Mich. 1973), *aff'd,* 542 F.2d 117 (6th Cir. 1976), *cert. denied,* 431 U.S. 969 (1977). ("Thus, §1988 is procedural only, and does not create a substantive cause of action for violation of federal civil rights.")

[14] *See, e.g.,* 122 Cong. Rec. 31471 (1976) (remarks of Sen. Mathias); 122 Cong. Rec. 31472 (remarks of Sen. Kennedy). *But see* 122 Cong. Rec. 12159 (remarks of Rep. Dunan).

[15] Notwithstanding the lack of any congressional intent to apply the attorney's fees provisions of Section 1988 to State court actions, there is the additional problem of the authority of Congress to authorize an award of fees against States in cases involving non-constitutional claims, such as this.

In *Hutto v. Finney,* 437 U.S. 678 (1978), the Court stated that Congress had the power to set aside the States' Eleventh Amendment immunity in order to enforce the Fourteenth Amendment which guarantees to citizens of this Nation the rights provided by that Amendment. *Id.* at 693. However, in *National League of Cities v. Usery,* 426 U.S. 833 (1976), the Court held that Congress may not exercise its power under the Commerce Clause to abridge rights reserved to the States by the Tenth Amendment. *Id.* at 854. A comparison of these cases supports the conclusion that Congress could only override the States' immunity in cases involving constitutional violations. Here, on the contrary, the alleged violation is of the Social Security Act and not the Constitution and therefore does not fall within the powers granted to Congress in Section 5 of the Fourteenth Amendment.



294 (1949); *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942); *New Orleans and Northwestern Railroad Company v. Harris,* 247 U.S. 367 (1918); *Central Vermont Rwy. Co. v. White,* 238 U.S. 507 (1915).

Thus, the attorney's fees provisions of Section 1988 were simply not intended to apply to actions in State court and the Supreme Judicial Court of Maine erred in awarding fees in this State court action under Section 1988.

## CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the August 31, 1979 Order of the Supreme Judicial Court of the State of Maine.

Respectfully submitted,

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